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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

SAMUEL RAY CALABRESE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Court formulate an instruction on reasonable doubt for use in all federal criminal trials?

2. Where multiple interstate shipments of property obtained by fraud are charged in separate counts, is the Government required to prove that each specific shipment involved property worth $5,000 or more?

3. Did Defendant's retrial violate the Double Jeopardy Clause where the trial judge, acting *sua sponte,* interrupted cross-examination of a Government witness and declared a mistrial on the basis it would be "unseemly" to permit the credibility of the witness to be attacked by a lawyer who had previously represented the witness?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SAMUEL RAY CALABRESE petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

On March 26, 1981, the Court of Appeals entered its panel opinion affirmed the conviction of Petitioner [hereafter Defendant] of sixteen counts of interstate transportation of property obtained by fraud [18 USC §2314], one count of

engaging in a pattern of racketeering activity [18 USC §1962(c)], and one count of conspiring to participate in racketeering activity [18 USC §1962(d)].

The opinion has not yet been officially reported and is set out in full as Appendix A hereof.

Defendant did not petition the Court of Appeals for a rehearing.

The Defendant is incarcerated at the Minimum Security Federal Correctional Institution at Lompoc, California.

JURISDICTION

Jurisdiction was initiated by criminal indictment of a federal grand jury; jurisdiction of this Honorable Court is invoked under 28 USC §1254(1). The Indictment appears as Appendix B hereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Fifth Amendment of the United States Constitution are:

> ". . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property, without due process of law. . ."

The pertinent provisions of 18 USC §1962 are:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections . . . (c) of this section.

The pertinent provisions of 18 USC § 2314 are as follows:

§ 2314. *Transportation of stolen goods . . .*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

A. The Indictment

Defendant and codefendants [Charles Calabrese, Charles Knowles and Albert Marcini] were indicted in the United States District Court for the District of Utah for conducting a business engaged in interstate commerce through a pattern of racketeering activity [18 USC § 1962(c)]; for fifteen counts of interstate transportation of property obtained by fraud [18 USC § 2314]; and conspiring to participate in racketeering activity [18 USC § 1962(d)]. (Appendix B.)

The charges, in substance, were that defendants used a Utah building-supply company to obtain materials on credit through fraudulent representations, that defendants did not pay for the merchandise and had not intended to pay for it, and that defendants moved the materials to Nevada and California for sale at prices below wholesale cost.

B. The First Trial

A jury trial commenced on October 18, 1978. On October 23, 1978, counsel for codefendants addressed the trial court with a potential problem about the testimony of the Government's intended witness, one, FACER. Mr. LEEDY, the attorney for codefendant MARCHINI, told the court he had formerly represented one, FACER, in other criminal litigation and that Mr. LEEDY had just learned that FACER, contrary to earlier statements made by FACER to LEEDY, intended in his testimony for the Government to inculpate codefendants MARCHINI and CHARLES CALABRESE. Mr. LEEDY told the court that he (LEEDY) might be a potential defense witness. An unresolved discussion occurred as to whether other persons had heard FACER'S prior statements exonerative of those codefendants and could testify thereto instead of Mr. LEEDY. The trial court passed the problem until matters became "more clearly apparent." A noon recess intervened; immediately thereafter, Mr. LEEDY against addressed the court and asked to be allowed to withdraw as codefendant MARCHINI'S attorney, and for a mistrial and severance as to MARCHINI because, if FACER did testify contrary to his earlier statements to Mr. LEEDY, then Mr. LEEDY would be the best witness to impeach FACER. Once again, the court passed the problem until it was seen how FACER actually testified.

FACER did, indeed, inculpate all defendants. When Mr. LEEDY cross-examined FACER, FACER testified, without objection by any party, that he had been convicted of felony-fraud in the State of Utah; that he had lied when he testified before a Federal Grand Jury in Los Angeles; but he denied that he had lied under oath on other occasions. FACER testified, without any objection, that he had filed a

pauper's oath in connection with expenses for his appeal from his Utah conviction, in which he had been represented by Mr. LEEDY. FACER denied that he had owned property at the time he filed the pauper's oath. FACER then admitted that he told the Federal Grand Jury in Los Angeles: "I still own a motel up in Montana. I own some property in Salt Lake City, and I still own a lot of property in Washington." FACER then testified that an indigency hearing had been conducted in the State of Utah where he gave sworn testimony relating to the pauper's oath. At that point, the trial court interrupted cross-examination, and the bench-colloquy set out below occurred.[1]

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[1]THE COURT: Could I see Counsel a minute at the Bench?

(The following proceedings were had at the Bench.)

THE COURT: it seems unseemly to me that Counsel who was responsible for this questioning is now representing another client as attacking his credibility.

MR. LEEDY: That's exactly the point I wanted to make yesterday when I requested permission to withdraw because I didn't believe Mr. Facer—

THE COURT: No, you didn't. You didn't make this plain. You didn't make the situation about forma pauperis. That was something entirely different.

MR. LEEDY: I thought I made it clear I would have to attack his credibility.

THE COURT: I think you may be getting yourself into trouble. I think it's—I just sense—I can't put my finger on it, but I just sense it's most unseemly to be attacking his credibility in a proceeding that you represented him in.

MR. LEEDY: I think it would be in any proceeding.

MR. KRAMER [Government attorney]: Are you talking about the Attorney-Client Privilege?

THE COURT: Presumptively you would have inquired into the facts that justified his filing in forma pauperis.

MR. LEEDY: I did ask if I was lied to.

THE COURT: And now we have to go through what he said to you and what you said to him presumptively in order to clear your skirts or to clear his or both.

(continued)

The trial jury was recessed and a lengthy colloquy occurred wherein the trial court consistently rejected all proposals for some disposition of the matter other than a mistrial as to all defendants.[2] The colloquy shows that the

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(footnote continued from preceding page)

MR. LEEDY: I agree. It's unseemly.

THE COURT: It shouldn't be done.

MR. LEEDY: If you request, I'll cease.

MR. BARBER [Attorney for codefedant Charles Calabrese]: I can probably cross-examine him about any matter that is public record.

THE COURT: I think we ought to take this out of the presence of the Jury.

(Emphasis supplied.)

[2]The lower court was not interested in whether or not the attorney-client privilege was involved between Mr. LEEDY and FACER, but only about the Court's obligation to prevent unseemly controversies being opened up in the courtroom. The Court was not concerned about whether Mr. LEEDY had justifiably relied on FACER'S original statements that he would exonerate codefendant MARCHINI, the Court saying: "I just know that we can't proceed." The Government proposed that if codefendant MARCHINI would waive any possible conflict of interest and elect to continue to be represented by Mr. LEEDY, the trial could proceed. The court rejected this proposal because it did not approve of Mr. LEEDY making a closing argument attacking the credibility of a former client. The Government then proposed that other defense counsel could complete FACER'S cross-examination and argue the issue of credibility to the jury. The court rejected this suggestion. The court considered granting a mistrial and severance only as to codefendant MARCHINI, but rejected this solution because of judicial economy and wanting to avoid having to go "through the rest of the time and having to repeat." The court considered recessing the trial until codefendant MARCHINI could retain substitute counsel, but discarded that possibility when Attorney BARKER (counsel for codefendant Knowles) said he believed he would be required to call Mr. LEEDY as a witness. Only once did the lower court address the issue of possible prejudicial impact on the jury, and then the court *did not find* that any prejudice existed, stating:

THE COURT: That isn't the point alone. That's just one point. The other point is it's arisen in the mind of the Court. I don't want in

(continued)

trial judge had made up his mind that he would not permit a separate trial for codefendant MARCHINI and that he would not permit the trial to continue because he thought it was "unseemly" for the jury to decide a credibility issue between the witness FACER and his former attorney, even if that attorney were replaced by substitute counsel for codefendant MARCHINI and appeared only as a witness.

In the early stages of the colloquy, counsel for Defendant expressed his view that a mistrial could be proper. This representation was not specifically withdrawn, but after the mistrial was declared from the bench, Defendant's counsel did elicit from the trial court the ruling that the mistrial was granted *sua sponte,* "taking into consideration the previous motions for mistrial that were made."

A timely motion for dismissal of the indictment on double jeopardy grounds was made by Defendant, and denied by the lower court.

The Court of Appeals upheld the mistrial as supported by "manifest necessity." No determination was made in the lower court, or by the Court of Appeals, that the jury was, or would be prejudiced, or even probably prejudiced. The Court of Appeals found the "manifest necessity" to reside in the mere "risk of bias." Although the lower court had never made any finding that the impartiality of the jury might have been effected, the Court of Appeals placed heavy reliance on the requirement of according "the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected." (See Appendix A.)

(footnote continued from preceding page)

this Court to have Mr. Leedy as counsel for a party in his final summation attacking the credibility of the Government witnesses when one of the key witnesses is his former client and upon circumstances which among other things are circumstances in which he was involved as an actor in getting the statements [pauper's oath] that are attacked.

C. Lack of Evidence of Value of Property

Government's witness WARNICK managed the building-supply company. Codefendant MARCHINI told WARNICK that MARCHINI desired a shipment of plywood and studs which WARNICK shipped on June 1st or 2nd, 1976, to Las Vegas, Nevada. After the shipment, WARNICK called codefendant MARCHINI and discussed the material on the truck that MARCHINI should have received and gave MARCHINI the price of the material, about which WARNICK testified in the most vague terms.[3]

WARNICK testified that he prepared a number of invoices on the shipments made in June, but some of the invoices were not prepared simultaneously with the shipments and that none of the shipping invoices were "priced out"—i.e., the cost of the merchandise was not specified on the shipping invoices. After a shipment was made, WARNICK would send an "after-invoice" with the truck drive probably on the next load the driver took to Nevada. WARNICK prepared the first invoice as a result of the first three loads that had gone out by keeping track on a separate piece of paper and transposing it on the invoice. WARNICK testified the other invoices were preparing by "tak[ing] the

[3] Q Well, tell the jury as best you can the words and gist of the words that were used. Relate the actual conversation, please.

A [WARNICK] He [Marchini] said, "How much are the studs?" I said, "One ninety-five per thousand," whatever the price was.

Q Whatever the price was?

A Yes. It seems like it was around there, one hundred ninety-five, as I recall.

Q What, if anything, did Mr. Marchini say?

A How much is the plywood. I said it is that much, however much it was.

bills we got from the suppliers, tak[ing] the prices off there, extend[ing] the amounts, and then add[ing] a 10% charge." When WARNICK was asked if he could go through the invoices and state which ones he wrote the prices on, WARNICK responded: "I could probably come through this and come fairly close."

A conglomerate exhibit of invoices, designated as Exhibit 20 was received over the objection of Defendant that WARNICK was unable to identify what writings he made and the time he prepared the invoices.

The shipping invoices were not receipted for by any person to show actual delivery of the material.

A truck driver employed by the building supply company testified that he hauled "maybe ten loads [to Las Vegas, Nevada] during the month of June." ROBBINS could not recall the material he hauled except in the most general terms, and without any specificity as to any particular load, except a load delivered to codefendant Marchini. As to that load, ROBBINS recalled shingles, roofing, tar paper roofing and some studs. ROBBINS also recalled another load delivered to codefendant Marchini consisting of bundles of so much wood. Codefendant Marchini was acquitted by the jury.

The Court of Appeals held that the "invoices provided ample proof that each truckload contained stolen goods worth at least $5,000." (See Appendix A.)

D. Instructions on Reasonable Doubt

The trial court's charge on reasonable doubt, and other instructions watering down the standard of proof beyond a reasonable doubt, are set forth hereafter. Objectionable

language in the charge is italicized. Omitted material in the charge, not bearing on the reasonable doubt standard, is indicated by asterisks.

4. * * *

Inconsistencies or discrepancies in the testimony of a witness or inconsistences or discrepancies as between the testimony of different witnesses are not uncommon in a courtroom nor in the ordinary affairs of everyday life. It is a human quality, of course, to observe in relation to others a different degree of efficiency depending upon the opportunity to observe, the capacity of individuals, limitations that may be present and so many things that bear upon that. *So, where you find that there is a difference in the testimony of witnesses or where the testimony of an individual witness is different within itself and inconsistent it will be your responsibility to resolve those differences and discrepancies.* And if it is innocent misrecollection, why, you are to recognize that. This is not uncommon as we have said, or to consider whether it pertains to a matter of importance and whether the discrepancy is a result of an intentional purpose to misrepresent or to testify falsely.

* * *

26K-3 * * *

There is a presumption that parties in their business relationships are prompted by honest motives. *In this case you must be satisfied beyond a reasonable doubt and not by mere conjecture or suspicion* that the defendants intentionally and wilfully and knowingly embarked upon a course of dealings with fraudulent purpose and intent before you can find by evidence which convinces beyond a reasonable doubt of the presence of this necessary element in this charge.

* * *

33. * * *

A reasonable doubt is a doubt based upon reason and common sense. It is a kind of a doubt that would make a resonable person hesitate to act. *Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs while bearing in mind that it is rarely possible to prove anything to an absolute certainty.*

The jury will remember as well that the defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A reasonable doubt exists whenever after careful and impartial consideration of all the evidence in the case the jurors do not feel *convinced to a moral certainty* that a defendant is guilty of the charge. *So, if the jury views the evidence in the case as reasonably permitting as to a particular charge either of two conclusions, one of innocence and the other of guilt, the jury should, of course, adopt the conclusion of innocence.*

* * *

38. * * *

There is nothing peculiarly different in the way the jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense. Consider the evidence in the case for only those purposes for which it has been admitted and *give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of human beings.*

* * *

39. * * *

> In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest convictions as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times you are not partisans. *Your sole interest is to ascertain the truth from the evidence in the case.*

The Defendant specifically objected to the language of Instructions Nos. 38 and 39.

The Court of Appeals held the giving of Instruction No. 38 that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending on the evidence presented them" was error, but not reversible error because (1) the "reasonable doubt standard" had been *"mentioned"* at least twenty-one times in the entire charge; and (2) the instruction that a reasonable doubt existed when the jurors did not feel "convinced to a moral certainty that a defendant [was] guilty of a charge" was a curative and non-objectionable instruction.

The Court of Appeals did not approve Instruction No. 39 telling the jury: "Your sole interest is to ascertain the truth from the evidence in this case." The Court of Appeals held that instruction would not have conveyed to the jury that it was one of two versions of the facts, regardless of the reasonable doubt standard.

Finally, the Court of Appeals held it would not consider other objections to the instructions raised for the first time on the appeal, even though Defendant contended (and still contends) that the erroneous instructions to which objection *was* made could not be considered "cured" or "harmless" on the basis of other reasonable doubt instructions which were

also erroneous. The Court of Appeals opined that the challenged instructions did not constitute plain error. (See Appendix A.)

Defendant contends that an error in the definition of proof beyond a reasonable doubt can never be harmless. The gravity of the errors in this case are especially pronounced, however, in view of the state of the evidence on the value of the merchandise transported in the fifteen separately charged courts of interstate transportation, which, in turn, were the basis for the predicate offenses for the Defendant's substantive RICO conviction. (Exhibit B.) In addition, Defendant offered evidence in his defense with respect to the financial transactions charged against him in the RICO conspiracy count, and heavily relied on by the Government in all other phases of the prosecution.[4]

[4]Defendant testified that codefendant Knowles proposed being able to obtain lumber at low costs and Defendant asserted if that were true, the lumber could be used to supply all the homes in Las Vegas; that payment was stopped on a $5,000 check because Defendant had not then received enough merchandise to justify the payment; that Defendant paid codefendant Knowles about $16,000 or $17,000 in the middle of June, 1976; that on behalf of codefendant Knowles or the building supply company, Defendant gave a $30,000 check to the creditor Kaibab, with instructions that the check be put through for collection and that it would clear the Defendant's bank before Defendant received the merchandise represented by the payment, but that the check was not put through for collection as agreed; that Defendant stopped payment on the $30,000 check and issued three checks for $10,000 which were to be deposited for collection, in series, as Defendant accumulated money from a flow of merchandise and was able to pay the checks in series; That Defendant paid codefendant Knowles $20,000 toward the end of June, 1976; that Defendant, at Knowles' request, deposited $100,000 in a Utah bank plus a fee of $3,500 for the transfer of the money, as an incentive for the bank to extend credit to codefendant Knowles; that Defendant paid $11,486 to Knowles by cashier's check about July 2, 1976, after no further shipments of merchandise were made to Defendant; and that even later, Defendant paid Knowles $8,000 by cashier's check on July 23, 1976.

E. The Conviction and Sentence

The Defendant was convicted of a substantive RICO count, of 15 separate counts of interstate transportation of stolen property, and one RICO conspiracy count. Defendant was sentenced to eight years' imprisonment and fined $10,000 on the substantive RICO count. Defendant was sentenced to eight-year terms of imprisonment on each count of interstate transportation of stolen property and the RICO conspiracy count, the terms to run concurrently with one another and with the sentence on the RICO substantive count.

REASONS FOR GRANTING THE WRIT

I.

FATALLY DEFECTIVE INSTRUCTIONS ON THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Defendant's rights under the Due Process Clause were violated by a jury charge which, in numerous particulars, substantially reduced and confused the requirement that the Government was required to prove the guilt of the Defendant, as to each and every fact necessary to constitute the crime charged, by proof beyond a reasonable doubt.

The numerous errors in the charge are not an isolated or bizarre occurrence. These errors, singly or in combination, appear in more or less exaggerated form, in a multitude of

cases on a national, federal level. Trial judges very frequently ignore appellate disapproval of certain language.[5]

The cases are legion in which federal appellate courts tolerate these errors on the basis that other instructions were adequate to protect the right of the defendant. That tactic was followed in this case, *not* on the basis that charge to the jury properly defined the evidentiary standard for the jury, but on the basis that "reasonable doubt" was *"mentioned"* twenty-one times, and that the jury was given the "curative" instruction in terms of being convinced of guilt to a "moral certainty."

The "moral certainty" charge confuses rather than clarifies the concept of reasonable doubt and jurors may interpret it to convey a standard based on something other than reason.[6] Such instruction permits the jury to convict or acquit on the basis of information which is incapable of verification, whereas the essence of the reasonable doubt standard is that guilt be established on evidence and the inferences permitted by law—not on speculation or intui-

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[5]*Holland v. United States,* 348 US 121, 75 SCt 127, 99 LEd 150 (1954) criticized a definition of proof beyond a reasonable doubt in terms of the kind of proof on which a person would be willing to act in the more serious and important affairs of his own life. Nevertheless, that charge, *27 years later* was given to the jury in this very case, even despite the reiterated disapproval of that language in the Court of Appeals below in *United States v. Leaphart,* 513 F2d 747 (10th Cir. 1975), where the Court of Appeals said:

> "The time has unquestionably arrived after *Holland,* [*United States v. Smaldone,* 485 F2d 1333 (10th Cir. 1973)] and [*United States v. Pepe,* 501 F2d 1142 (10th Cir. 1974)] for the trial courts to change this instruction and to couch it in the terms prescribed by the Supreme Court of the United States. . ."

[6]*United States v. Whitaker,* 372 FSupp 154, 160 (USDC, Pa. 1974), aff'd 503 F2d 1400 (3rd Cir. 1974), cert. den. 419 US 113, 95 SCt 789, 42 LEd2d (1975).

tion.[7] What is a "moral certainty" is a matter of personal subjectivity with each individual juror, depending upon whatever moral beliefs or precepts he may happen to hold. A "moral certainty" cannot conceivably constitute a *standard* of objective, evidentiary proof.[8] In the face of mounting criticism of the "moral certainty" concept, such language was omitted in the formulation of a reasonable doubt instruction in Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1077) §11.14, pp. 310, 311 subp. (b).

In the past several years the Government's burden of proof beyond a reasonable doubt has been recognized as a right of the defendant protected by the Due Process Clause. *In re Winship,* 397 US 358, 25 LEd2d 368, 90 SCt 1068 (1970).

The presumption of innocence, although not articulated in the United States Constitution, is a basic component of a fair trial. *Estelle v. Williams,* 425 US 501, 48 LEd2d 126, 96 SCt 1691 (1976). The prosecution's burden of proof beyond a reasonable doubt and the presumption of innocence are logically similar, but both are necessary under the Due Process Clause to protect the accused against conviction in violation of those standards. *Taylor v. Kentucky,* 436 US 478, 56 LEd2d 468, 98 SCt 1930 (1978).

In reviewing the constitutional sufficiency of jury instructions, careful attention must be given to the words actually

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[7]*Dunn v. Perrin,* 570 F2d 21 (1st Cir. 1978), cert. den. 437 US 910, 98 SCt 3102, 57 LEd2d 1141 (1978).

[8]Jurors are screened for normal percipience—the ability to see and hear, to understand our common language, and for sanity. Jurors are screened for their ability and willingness to decide the case on the basis of the courtroom evidence, in accordance with the law laid down in the charge. But jurors are not, and in a free, pluralistic society, they cannot be, screened for having attained or adopted a moral standard, except that they be not convicted felons.

spoken, because whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction. *Sandstrom v. Montana,* 442 US 510, 99 SCt 2450, 61 LEd2d 39 (1979).

Indeed, *Sandstrom,* expressing the view of an unanimous court, denounced the giving of an instruction to the effect that "the law presumes that a person intends the ordinary consequences of his voluntary acts," as conflicting with the overriding presumption of innocence, extending to every element of the crime. Yet, in the present case, the sense of the outlawed *Sandstrom* instruction, only slightly watered down, was given to the jury in this case by the charge that the jury was to construe the evidence "in the light of your common knowledge of the natural tendencies and inclinations of human beings."[9] This language incorporated a "reasonable person" standard, and relieved the Government of proving, and the jury of finding, actual and subjective knowledge and intent on the part of the Defendant. *United States v. Stephens,* 569 F2d 1372 (5th Cir. 1978). To make matters worse, the charge came just after an instruction that "[t]here is nothing peculiarly different in the way the jury should consider evidence in a criminal case from that in which all reasonable persons treat any questions depending upon the evidence presented to them."

The "nothing particularly different" instruction has been expressly disapproved in the Court of Appeals below, as

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[9]*United States v. Ariza-Ibarra,* 605 F2d 1216 (1st Cir. 1979) held, in a case reversed on other grounds and remanded for a new trial, that the charge: "It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted" was perilously close to error, and that the instruction should not be used at the new trial.

confusing the standard of proof required for conviction. *United States v. Pepe,* 501 F2d 1142 (10th Cir. 1974). *Tarvestad v. United States,* 418 F2d 1043 (8th Cir. 1969) held that the "nothing particularly different" instruction was inconsistent with the standard of proof beyond a reasonable doubt and that the instruction had no legal foundation.

In this case the jury was charged that its "sole interest [was] to ascertain the truth from the evidence in the case." In *United States v. Pine,* 609 F2d 106 (3rd Cir. 1979) the jury was told with reference to whether the witnesses for the Government, or the witnesses for the defense, were telling the truth, "[y]our basic task is to evolve the truth." Noting that this instruction had been held to impair the constitutional requirement of proof beyond a reasonable doubt, *Pine* held there could be no doubt that the meaning of this instruction ran counter to the requirement of proof beyond a reasonable doubt.[10] A similar instruction was condemned in *United States v. Stanfield,* 521 F2d 1122 (9th Cir. 1975) as

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[10]The *Pine* court was of the view that the instruction was not reversible error because the trial judge had given a forceful charge on the requirement of proof beyond a reasonable doubt. Notably, the reasonable doubt charge in *Pine* is free from the errors which infest the reasonable doubt charge in the present case. The *Pine* charge was:

> In this case, as in every criminal case, a defendant is presumed to be innocent until he is proved to be guilty. Thus a defendant, although accused, begins the trial with a clean slate, so to speak, with no evidence against him. This presumption of innocence continues until overcome by proof establishing guilt beyond a reasonable doubt. The burden of proving every essential element is upon the Government and always upon the Government. That burden never shifts but rests upon the Government throughout the entire case. It is not required that a defendant prove his innocence. The law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence. If there be a reasonable doubt whether the defendants are guilty, they are to be declared not guilty.

"obscuring" the correct standard for jury consideration of evidence in a criminal case. The jury could have understood it was their duty to decide the case only by determining what evidence was "true," totally oblivious to the rule that even though the defense evidence might be less believable than that of the Government, the defendant was nevertheless entitled to be found not guilty if all of the evidence left them with a reasonable doubt as to guilt.

The erroneous "ascertain the truth" charge was aggravated by the further charge requiring the jury in this case to "resolve those differences and discrepancies" in the testimony. Such direction impermissibly conditions the right of the jury to disbelieve any testimony, even that testimony which is not contradicted. *United States v. Holland,* 526 F2d 284 (5th Cir. 1976).

The Defendant specifically objected to the "nothing peculiarly different" instruction (No. 38) and the "sole interest is to ascertain the truth" instruction (No. 39). These errors could not possibly have been "cured" by the mere mention (however many times repeated) of the standard of reasonable doubt, because that standard was erroneously communicated to the jury in numerous particulars. The matter of being convinced to a "moral certainty" has already been noted, as has the fact that the standard was expressed in

terms of "willingness to act."[11] The "willing to act" charge was internally conjoined with the charge for the jury to bear in mind that it is rarely possible to prove anything to an absolute certainty. The sentence reads:

> Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs while bearing in mind that it is rarely possible to prove anything to an absolute certainty. (Instruction No. 33)

This "absolute certainty" charge, coupled with the "willing to act" charge, could only have served to reinforce in the minds of the jurors the concept that risk-taking is a necessary ingredient of private acts in the conduct of one's own affairs, and likewise acceptable as a standard for rendering a verdict.[12] Additionally, immediately after the "absolute

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[11]*Scurry v. United States*, 120 USAppDC 374, 347 F2d 468, 470 (1965) states:

> "A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessary be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary."

Commonwealth v. Ferreira, 364 NE2d 1264, 1273 (Mass. 1977) states:

> The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

[12]A similar charge was given in *Dunn v. Perrin*, 570 F2d 21 (1st Cir. 1978), as follows:

> It is a matter of common knowledge to us all that absolute positive certainty in regard to many of the affairs of life can almost never be

(continued)

certainty" charge, Instruction No. 33 stated, as a parallel to the reasonable doubt standard, the following:

> The jury will remember as well that the defendant is never to be convicted on mere suspicion or conjecture.

This same parallelism occurred in instruction 26K-3, where the jury was told it must be satisfied beyond a reasonable doubt and not by mere conjecture or suspicion as to the intent, wilfullness and knowledge of the defendants. The juxtaposition of "proof beyond a reasonable doubt" vs. "mere suspicion and conjecture" carries the implicit idea that if the evidence rose above mere suspicion and conjecture, such could lawfully constitute "proof beyond a reasonable doubt."

Finally, Instruction No. 33 charged the jury according to the balancing test:

> [I]f the jury views the evidence in the case as reasonably permitting as to a particular charge either of two conclusions, one of innocence and the other of guilt, the jury should, of course, adopt the conclusion of innocence.

This test clearly suggests that a reasonable doubt cannot exist unless the defendant's evidence is in balance with that of the Government. *United States v. Pena,* 527 F2d 1356 (5th Cir. 1976).

(footnote continued from preceding page)

> attained, and even in our most important matters, we frequently act upon information which we do not positively know to be absolutely true and which we have no means of verifying, but as to the truth of which we are morally certain. In such instances there is no reasonable doubt.

This instruction, combined with other errors, including an erroneous "willing to act" charge, obfuscated the essentials of due process and fair treatment, requiring reversal of the conviction where the evidence against defendants, though substantial, was not overwhelming, and the possibility existed that the jury was misled by the charge. *Harrington v. California,* 395 US 250, 89 SCt 1726, 23 LEd2d 284 (1968); *Andes v. United States,* 333 US 740, 752, 68 SCt 880, 92 LEd 1055 (1947).

The portions of the charge specifically objected to cannot be characterized as harmless error, or as cured by other instructions, because the errors are of constitutional dimension. *Chapman v. California,* supra n. 11; *Dunn v. Perrin,* supra, n. 11; *United States v. Harrigan,* 586 F2d 860 (1st Cir. 1978); *United States v. Pinkney,* 551 F2d 1241 (DC Cir. 1976).

The petitioning Defendant was convicted on the basis of erroneous and contradictory evidentiary standards given to the jury in violation of Defendant's rights under the Due Process Clause of the Fifth Amendment of the United States Constitution.

Even if there had been *no* objection to any portion of the charge, a trial judge is constitutionally required to give a proper instruction on reasonable doubt; his failure so to do is plain, fundamental error. *In re Winship,* supra; *Estelle v. Williams,* supra; *Taylor v. Kentucky,* supra; and *Sandstrom v. Montana,* supra.

The issue hereby raised is of the most grave constitutional concern to this Defendant and is, moreover, representative of widespread error and abuse in federal courts across the nation. If certiorari be granted, and Defendant is permitted to brief the issue, Defendant can establish that the erroneous instructions herein objected to, and other similar abuses as to the standard of proof beyond a reasonable doubt, are occurring in federal trials on a massive scale.

Because of the centrality of a proper charge on the standard of proof beyond a reasonable doubt, as a matter of due process, the time is surely ripe for this Honorable Court to make a definitive pronouncement expressing the language in which juries should be charged, and specifically prohibiting any additional instructions, like those in the instant case, which modify that standard of proof in any respect or to any degree.

II.

THE EVIDENCE WAS NOT SUFFICIENT TO PROVE CONTENT AND VALUE OF ANY SPECIFIC TRUCKLOAD TRANSPORTED IN INTERSTATE COMMERCE

A violation of 18 USC § 2314 requires proof of the federal jurisdictional requirement of interstate transportation of specific property. *United States v. Mitchell,* 588 F2d 481 (5th Cir. 1979). A violation of § 2314 requires proof that the value of the property transported was worth at least $5,000. *United States v. Whetzel,* 589 F2d 707 (CA DC, 1978). The standards of appellate review forbid affirmance of a conviction unless there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt as to each of the elements constituting the cree. The mere existence of "some" or "any" evidence is not sufficient to support a conviction. *Jackson v. Virginia,* 443 US 307, 99 SCt 2781, 61 LEd2d 560 (1979).

In the instant case, apart from the matter set forth in the foregoing Statement of the Case, the Government relied on WARNICK'S testimony that on June 30, 1976, he sent a month-end statement to the Defendant which WARNICK had prepared from bills and invoices, and that on July 22, 1976, the Defendant called WARNICK from California, and Defendant said that he had received the statement. The WARNICK testimony is quoted below.[13] Defendant thus

[13]WARNICK: Sam. Sam Calabrese said that he was in Los Angeles, and he was working on selling some merchandise to get us paid. And I said, "Well, that's good. Did you get the statement and the letter of June 30th?" Sam said, "Yes, I did. All the invoices look good. What we have got to do is work out an arrangement where I can get some time to pay for this stuff. You prepare a statement that all the invoices and what was on them was in good condition and I received it and I will sign it and send it back to you." I said, "Okay. I will do that."

acknowledged that he had received a statement and said all the invoices looked good, but Defendant specifically did *not* acknowledge that he had received any specific loads of merchandise. All the shipments in counts four through nineteen of the Indictment were alleged to have been made to Las Vegas, Nevada. Defendant, calling from California, wanted a further statement verifying the condition of the merchandise and the receipt thereof by Defendant. There was no evidence that this merchandise was ever prepared by WARNICK. This evidence will not support a conclusion that Defendant acknowledged that he ever received any specific load of merchandise or that any specific load had any particular value.

The case relied on by both the Government, and the Court of Appeals, *United States v. Jones,* 421 F2d 841 (4th Cir. 1970) did not involve any issue of multiple interstate shipments. Jones was convicted of interstate transportation of stolen food in excess of $5,000. Jones had stolen the food while it was being delivered from the supplier to its customers. The only evidence of market value consisted of invoices for the stolen goods showing a total price of $5,071.10. The opinion states: "This was the price agreed upon by the buyers and seller of these goods and as such, is competent evidence of market value."

In the instant case there is no evidence that the Defendant agreed upon any value of the merchandise, or that any specific interstate shipment had a specific market value in excess of $5,000. Consequently, the Defendant's convictions on the interstate transportation counts must fall, and his RICO conviction must also fall, for lack of proof of the predicate offenses alleged to constitute a pattern of racketeering activity.

III.

THE MISTRIAL WAS NOT REQUIRED BY MANIFEST NECESSITY AND DEFENDANT'S RETRIAL VIOLATED THE DOUBLE JEOPARDY CLAUSE.

The Court of Appeals has made an unwarranted extension and application of the language of *Arizona v. Washington,* 434 US 497, 54 LEd2d 717, 98 SCt 824 (1978). In that case, the defendant's attorney, in his opening statement to the jury, said that evidence would bring out that the defendant had been granted a new trial by the state supreme court because of misconduct by the prosecutor in purposely hiding and suppressing evidence from the defendant at the first trial. The trial court first deferred ruling on a motion of the prosecution for a mistrial made after the close of the opening statements, and then, after two witnesses had testified, the trial court granted a renewed mistrial motion made by the prosecutor. In reviewing a federal habeas proceeding, the Court was confronted with the fact that the trial court had not made any specific finding that the mistrial was required by "manifest necessity" and that the trial court had not made a record of the consideration of alternatives to a mistrial and the reason for their rejection. The Court held that there are degrees of necessity, and that a "high degree" is required before it can be concluded that a mistrial is appropriate. The Court also held that in a strict, literal sense, the mistrial was not "necessary." But, the evenhanded administration of justice required the Court to give the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment. The Court further held, however, that since a constitutionally protected

interest is inevitably affected by any mistrial decision, the trial court must always consider the importance *to the defendant* of being able, one and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. *United States v. Jorn,* 400 US 470, 486, 27 LEd2d 543, 91 SCt 547 (1971). On appeal, the reviewing court has an obligation to satisfy itself that the trial judge exercised a sound discretion in declaring a mistrial.

The Court of Appeals below evidently viewed *Arizona v. Washington,* supra, as creating a rule that an exercise of discretion in this area is to be tested in the same manner as an exercise of discretion in any ruling on any matter during the course of a trial. The Court of Appeals did not find that there was a "high degree" of necessity for a mistrial. Neither the trial court nor the Court of Appeals determined that there was any *likelihood* of the jury being prejudiced by any matter which *preceeded* the mistrial order. The Court of Appeals went completely *outside the record* in ruling that the testimony "placed the attorney's ethics in issue because he had prepared the allegedly false pauper's affidavit." (Exhibit A, p. 4.) There was never any suggestion before the lower court by any defendant that they would be prejudiced "because the jury would tend to associate this attorney and his client with co-counsel and their clients." The over-riding concern of the trial court was that it was "unseemly" for the Government's witness to have *his* credibility attacked by his former attorney.

The Court of Appeals also went *outside the law* in holding that a severance or substitution of counsel would not have eliminated the "risk of bias" created by the questions raised about the attorney's ethics. The defendants were surely entitled to impeach the Government's witness by proving

that the witness had lied under oath about his status as a pauper, and that he had lied to the attorney who prepared the pauper's affidavit. There is no rule of law, anywhere, which prohibits a lawyer from testifying that his former client lied to him. *United States v. United Shoe Machinery Corp.*, 89 FSupp 357, 358-359 (D. Mass. 1950).

A trial court is obligated to refrain from any unjustified interruption of the trial on the basis of *sua sponte* protection of a witness. *United States v. Jorn*, supra [trial judge should not have aborted a trial because he thought Government witnesses had not been adequately warned of their Fifth Amendment rights and that they would incriminate themselves if they testified]; *United States v. Sanders*, 591 F2d 1293 (9th Cir. 1979) [a witness had testified the defendant forged a check; a continuance was ordered for the witness to give a handwriting exemplar, and expert analysis suggested it was the witness who had forged the check; the witness was indicted for perjury and forgery; when trial reconvened the court declared a mistrial because the jury had been exposed to "tainted" evidence; this procedure prevented the defendant from impeaching the Government witness]; *United States v. McKoy*, 591 F2d 218 (3rd Cir. 1979) [Court insisted that the defendant was entitled to the testimony of her trial counsel, although she had waived such testimony and desired the trial to continue with her present trial counsel].

Unless certiorari be granted, the opinion of the Court of Appeals will stand as authority that the trial judge has a range of discretion in granting a mistrial which is equal to his range of discretion in non-constitutional matters, and depriving defendants of the benefit of the constitutional prohibition against being twice placed in jeopardy whenever any degree of *judicial* desire or convenience will be served

by a mistrial. The trial court improperly rejected numerous alternatives put before it, and the Court of Appeals improperly determined that no alternative would have been sufficient to permit the continuance of the trial.[14]

Downum v. United States, 372 US 734, 10 LEd2d 100, 83 SCt 1033 (1963) held the retrial of the defendant was barred where the trial judge ordered a mistrial when a key witness for the Government could not be located. The Court relied on *United States v. Watson* (DC NY, 1868, Fed. Case No. 16651, 28 Fed.Cas. pp. 499, 501), where the Court said:

> ". . . To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants."

That is precisely the door which is thrown open by the action of the lower court and the Court of Appeals in this case.[15]

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[14]The trial court could have permitted other defense counsel to cross-examine FACER on the pauper's affidavit. *United States v. McKoy,* supra.

The trial court could have severed codefendant MARCHINI from the trial and proceeded with the trial of remaining defendants. *United States v. Alford,* 516 F2d 941 (5th Cir. 1975) [". . . Mere judicial convenience in handling co-conspirators in the same trial has never been held to constitute an interest in the magnitude of a 'manifest necessity.' "].

The trial could have been continued while codefendant MARCHINI obtained substitute counsel. *United States v. Jorn,* supra; *United States v. Alford,* supra.

[15]The Court of Appeals did not pass upon the issue whether or not the Defendant had waived his Double Jeopardy rights by requesting or consenting to the mistrial. (See Appendix A.)

If a determination as to that matter is deemed necessary by a remand to the Court of Appeals or otherwise, Defendant relies upon the circumstances that the trial court specifically ruled that the mistrial had been ordered *sua sponte;* that the mistrial resulted from the failure of the trial court to take remedial action when the issue was twice raised by defense counsel LEEDY, before the matter became precipitate; and the further circumstance that the Defendant, throughout the entire colloquy which ended in the mistrial declaration, was obviously amenable to a continuation of the trial under one of the alternative proposals.

JOINDER IN PETITIONS OF CODEFENDANTS

In the event petitions for writs of certiorari are filed by codefendants herein, Defendant hereby relies upon issues and authorities raised in such other petitions to the extent that the same are applicable to Defendant or supportive of issues raised hereby.

Respectfully submitted,

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3-26-81 79-1388 - 79-1390 - 79-1392

APPENDIX A

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

FILED
United States Court of Appeals
Tenth Circuit
MAR 26 1981
HOWARD K. PHILLIPS
Clerk

United States Court of Appeals

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Nos. 79-1388
	)	79-1390
CHARLES ARMEN CALABRESE,	)	79-1392
SAMUEL RAY CALABRESE,	)	
CHARLES R. KNOWLES,	)	
	)	
Defendants-Appellants	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D. C. No. CR-78-00087)

James N. Barber of Barber, Verhoef & Yocom, Salt Lake City, Utah, for Appellant Charles Armen Calabrese.

Oscar Goodman, Las Vegas, Nevada, for Appellant Samuel Ray Calabrese.

Michael Allen Straud, Aurora, Colorado, for Appellant Charles R. Knowles.

John Depue, Department of Justice, Washington, D. C. (with Ronald L. Rencher, United States Attorney, Salt Lake City, Utah, on the briefs) for Appellee United States of America.

Before McKAY, BRIETENSTEIN and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

Facts

Defendants Samuel Calabrese, Charles Calabrese and Charles Knowles were convicted of sixteen counts of interstate transportation of stolen property (18 U.S.C. § 2314), one count of engaging in a pattern of racketeering activity (18 U.S.C. § 1962(c)), and one count of conspiring to participate in racketeering activity (18 U.S.C. § 1962(d)). The indictment charged that defendants used a Utah building supply company to obtain building materials on credit with no intention of paying for them. The merchandise was allegedly transported to Nevada and California and sold.

Double Jeopardy

Defendants' first trial ended in a declaration of mistrial. Counsel for a co-defendant who was eventually acquitted

attempted to impeach a government witness by inquiring whether the witness had lied in a pauper's affidavit filed in an earlier criminal proceeding. The examination revealed that the attorney had represented the witness in the earlier proceeding and had prepared the affidavit he was using for impeachment.

The trial judge stopped the questioning and conducted a hearing outside the jury's presence. The judge expressed concern that an attorney's impeachment of a former client with information obtained in their professional relationship made the attorney both a witness and an advocate for his position, injured the attorney-client relationship, and would bring disrespect upon lawyers and the court.

After discussion of the courses available to cure the impropriety, counsel for Samuel Calabrese recommended mistrial as the only viable alternative. The attorneys for Knowles and Charles Calabrese joined in the motion, but the latter subsequently withdrew from it. The government opposed the motion. After further discussion of the alternatives, the judge agreed that a mistrial was necessary. Upon later inquiry by counsel, the judge explained that the mistrial "motion was granted *sua sponte* taking into consideration the previous motions for mistrial that were made." (Record, supp. vol. A, at 42).

Prior to the commencement of the second trial, defendants moved for dismissal of the indictment on double jeopardy grounds. The court denied the motions, reminding counsel that their motions had prompted the mistrial declaration and finding, in any event, that the mistrial had been warranted by manifest necessity.

A defendant may not be retried after a declaration of mistrial unless the defendant requested or consented to the mistrial or unless that was "manifest necessity" for the

mistrial. *Arizona v. Washington,* 434 U.S. 497, 505 (1978); *United States v. Dinitz,* 424 U.S. 600, 607-08 (1976) (quoting *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824)). Because we find that there was manifest necessity for the mistrial declaration, we need not decide whether any defendant was barred from objecting to re-prosection by requesting or consenting to the mistrial.

We note first that the mistrial declaration was not caused by prosecutorial or judicial overreaching. *Cf. United States v. Scott,* 437 U.S. 82, 94 (1978); *United States v. Dinitz,* 424 U.S. 600, 611 (1976). The impropriety was introduced by a defense attorney, and the government strenuously opposed the mistrial motion.

The words "manifest necessity" do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Arizona v. Washington,* 434 U.S. 497, 506 (1978) (footnote omitted). The court below was confronted with a kaleidoscope of problems, including a possible violation of the attorney-client privilege, the attorney's role as both an advocate and a witness in the proceedings, and a controversy over the ethical propriety of the attorney's prior representation of the witness. The testimony placed the attorney's ethics in issue because he had prepared the allegedly false pauper's affidavit. The exchange was prejudicial to all defendants because the jury would tend to associate this attorney and his client with co-counsel and their clients. Counsel for Samuel Calabrese and Knowles told the court they felt obligated to call the attorney as a witness on credibility. This would have deepened the conflict between the attorney's role as advocate and witness and would have exacerbated the controversy over the attorney's ethics.

The record reveals that before declaring the mistrial the

court considered a number of less drastic alternatives, including severing the trial of the defendant whose attorney had caused the impropriety, permitting him to obtain new counsel, and restricting the scope of cross-examination insofar as it related to disclosure of privileged communications. However, the court was not required to accept a solution which remedied only one of the problems or offered only temporary relief. A severance or substitution of counsel would not have removed the ethical issues raised in the jurors' minds or eliminate the other defendants' interest in impeaching the witness through use of the pauper's affidavit. Limiting the scope of cross-examination would have provided only limited relief, since counsel for two defendants indicated they would be obligated to call the attorney as a witness on the credibility issue. These or other remedial measures would not have necessarily removed the risk of bias created by the questions raised about the attorney's ethics. "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected . . . ." *Arizona v. Washington*, 434 U.S. 497, 511 (1978). Therefore we sustain the trial court's finding that there was "manifest necessity" for a declaration of mistrial.

Motion for Change of Venue

Prior to trial, Charles Calabrese unsuccessfully moved for change of venue from the District of Utah to the District of Nevada on the grounds that he, another defendant, and witnesses they intended to call resided in Nevada, that the

cost of transporting and housing the witnesses would constitute an undue burden, and that the character witnesses enjoyed reputations for integrity in Las Vegas and therefore would be more persuasive to a jury in Las Vegas.

Fed. R. Crim. P. 21(b) permits a court upon motion to transfer a proceeding to another district "[f]or the convenience of parties and witnesses, and in the interest of justice." The decision whether to grant a motion for change of venue rests largely in the sound discretion of the trial judge. *United States v. Jobe,* 487 F.2d 268, 269-70 (10th Cir. 1973), *cert. denied,* 416 U.S. 955 (1974); *Wheeler v. United States,* 382 F.2d 998, 1001-02 (10th Cir. 1967).

While the factors cited would support the granting of the motion, when weighed in context they do not compel that result. The business enterprise that was alleged to be the front for perpetration of the fraudulent scheme was located in Utah. Eight of the government's witnesses resided in Utah, and the offices of most of the victimized building supply firms were in Utah. Utah was "the location of events likely to be in issue," as well as "the location of documents and records likely to be involved." *Platt v. Minnesota Mining & Manufacturing Co.,* 376 U.S. 240, 244 (1964). The trial judge did not abuse his discretion in denying the motion for change of venue.

Severance

Samuel Calabrese and Knowles claim that the trial judge abused his discretion by denying their motions for severance.

Contrary to Calabrese's contention, his defense was not directly antagonistic to Knowles' defense, and severance

was not required. Knowles, who managed the business in Utah, testified that his inability to pay creditors was caused by the bank's refusal to honor checks written by Samuel Calabrese, who received the merchandise in Nevada. Calabrese's defense was not inconsistent with this testimony. Calabrese testified that he had stopped payment on certain checks because he had received insufficient merchandise to warrant the payment or because he intended to substitute checks for smaller amounts to facilitate collection. Both defendants testified that other payments were completed. Both defendants sought to demonstrate that they lacked the requisite intent to defraud. Neither accused the other of criminal culpability or of possessing the intent to defraud. Therefore, it was not the case that the defenses were irreconcilable, or that " 'the jury [would] unjustifiably infer that this conflict alone demonstrates that both are guilty.' " *United States v. Becker,* 585 F.2d 703, 707 (4th Cir. 1978) (quoting *United States v. Ehrlichman,* 546 F.2d 910, 929 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977)), *cert. denied,* 439 U.S. 1080 (1979). One defendant's attempt to cast blame on the other is not in itself a sufficient reason to require separate trials. *United States v. Ready,* 574 F.2d 1009, 1015 (10th Cir. 1978).

Samuel Calabrese complains that the joint trial prejudiced him by necessitating his taking the stand to rebut Knowles' testimony and thus exposing him to the revelation of his former convictions. Severance would not have alleviated this problem, however, since Knowles' testimony concerning the dishonored checks was a repetition of the testimony of government witnesses, particularly the building supply company's president.

Calabrese also contends that separate trials would have avoided the impropriety leading to the mistrial declaration.

While this may be true, we cannot by hindsight find an error on this basis. A rule requiring separate trials whenever the unexpected conduct of one attorney or defendant might prejudice another would preclude the use of joint trials altogether, a result unsupported by authority. While that and other risks which typically attend joint trial should always be present in the mind of the trial court when considering severance motions, the fact that the impropriety ultimately occurs does not, standing alone, render the court's advance decision an abuse of discretion.

Knowles argues that a severance was required because the evidence of Samuel Calabrese's disposal of the merchandise, threat to a driver, and prior convictions of similar charges made it impossible for Knowles to receive a fair trial. However, since Samuel Calabrese's efforts to dispose of the merchandise and his threat were part of the conspiracy alleged in the indictment, evidence of them would have been admissible against Knowles in a separate trial. The unsavory reputation and prior convictions of co-defendants are not grounds for severance. *United States v. Knowles,* 572 F.2d 267, 270 (10th Cir. 1978); *United States v. Baldarrama,* 566 F.2d 560, 569 (5th Cir.), *cert. denied,* 437 U.S. 906 and 439 U.S. 844 (1978). We believe that this evidence did not sufficiently prejudice Knowles so as to deny him the right to a fair trial.

"To establish abuse of discretion more is required than that separate trials might have offered a better chance for acquittal of one or more of the accused." *United States v. Knowles,* 572 F.2d 267, 270 (10th Cir. 1978). The district court did not abuse its discretion in refusing to grant the severance motions made by Samuel Calabrese and Knowles.

Sufficiency of the Evidence

Conviction of defendants under 18 U.S.C. §2314 requires the government to prove beyond a reasonable doubt that defendants (1) transported in interstate commerce (2) stolen goods (3) worth $5,000 or more, (4) knowing at the time of the transportation that the goods were stolen. *Anderson v. United States,* 406 F.2d 529, 531 (8th Cir. 1969). Defendants challenge the sufficiency of the evidence as to some of these elements. In reviewing the jury's verdicts, we must view the evidence in the light most favorable to the government and determine whether a reasonable juror could be convinced beyond a reasonable doubt of each defendant's guilt as charged. *See Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Johnson,* 589 F.2d 716, 720 (D.C. Cir. 1978). An examination of the evidence under this standard reveals that it was sufficient to support the verdicts.

Knowles argues that the evidence failed to establish the source of the transported merchandise and thus failed to prove it was stolen. However, the evidence showed that the building supply company purchased merchandise on credit from the defrauded suppliers for the purpose of transmitting it to the Calabrese brothers in Nevada. Also, the company president testified that his practice was to list the prices for the merchandise on the invoices and send the priced invoices to the Calabrese brothers *after* he received the wholesale prices from the defrauded suppliers. This testimony indicates that the shipped merchandise came from the defrauded suppliers. Lastly, two witnesses testified that merchandise delivered to the out-of-state outlets came from one of the defrauded creditors.

Knowles and Samuel Calabrese contend that the government failed to prove that the truckloads of transported

building materials each had a value of $5,000 or more. However, the invoices provided ample proof that each truckload contained stolen goods worth at least $5,000. *See United States v. Jones,* 421 F.2d 841, 842 (4th Cir. 1970).

Knowles challenges the sufficiency of proof of the *mens rea* element. We believe, however, that the evidence on this issue was sufficient. The evidence showed that Knowles made numerous misrepresentations concerning the destination of the merchandise and the ultimate recipient's solvency. He told a witness that the company president would "stay up front and take the heat" that might result from Knowles' dealings through the building supply company. (Record, vol. 5, at 473). When the company president told Knowles that a creditor believed "that there is a rip off going on and that you are involved in it," Knowles responded, "I am." (Record, vol. 4, at 136).

Charles Calabrese challenges the sufficiency of the evidence as to all counts. The evidence showed that he set up the initial meeting between some of the conspirators. He ordered appliances from the Utah building supply company and assisted in receiving merchandise at the Nevada outlet. He attempted to sell merchandise below cost and made false representations about the source of goods. He also sought to deceive purchasers about the source of merchandise by directing a truck driver to remove the signs from a truck and by counseling the driver to tell purchasers that he didn't know where the goods came from. He threatened the driver that failure to cooperate would result in death.

Therefore, there was abundant circumstantial evidence that Charles Calabrese entered into the agreement and abundant direct evidence that he was one of the principal actors in the conspiracy. Since the evidence showed that the acts of interstate transportation were objectives of the

conspiracy, defendant's conviction on each of the interstate transportation counts and on the count charging a pattern of racketeering activity were also clearly supported by the evidence. *Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946).

Declarations of Co-conspirators

Charles Calabrese protests the admission into evidence of co-conspirators' declarations under Fed. R. Evid. 801(d)(2)(E).

In *United States v. Andrews,* 585 F.2d 961, 965 (10th Cir. 1978), we held that prior to admitting a co-conspirator's declaration under Fed. R. Evid. 801(d)(2)(E) the district court judge must determine from independent evidence that it was more likely than not that a conspiracy existed, that defendant and the declarant were members of the conspiracy, and that the declaration was made during the course of and in the furtherance of the objects of the conspiracy. *See United States v. Petersen,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied,* 100 S.Ct. 2985 (1980). We also said that "[e]vidence of the acts and statements of other co-conspirators may be admitted prior to demonstrating participation in the conspiratorial scheme by the objecting defendant, providing the foundation is subsequently laid." *United States v. Andrews,* 585 F.2d at 966.

These procedures were followed here. The distroct court admitted the statements conditionally. At the close of the government's case, the court found that a preponderance of independent evidence demonstrated the conspiracy's existence and the defendants' membership in the conspiracy. Since the declarants were defendants, the court effectively

found that the declarants were also members of the conspiracy. At the close of all the evidence, the district court repeated its finding that a preponderance of independent evidence showed the conspiracy's existence.

The record makes clear that the trial judge had *Andrews* in mind and understood his responsibility under the *Andrews* standards. Although he did not explicitly say that the statements were made during the course of and in furtherance of the conspiracy, the record clearly reveals that the statements satisfied this test. Under these circumstances, we cannot say that a reversible error was made.

Calabrese argues that the trial court must determine the conspiracy's existence *prior* to the admission of co-conspirators' statements. In *United States v. Petersen,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied,* 100 S.Ct. 2985 (1980), we adopted the procedures set forth in *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979). The procedure provide

> that it is prefeable, whenever possible, to require the Government to first introduce independent proof of the conspiracy and, subsequent thereto, to establish the connection of the defendant with the conspiracy before admitting hearsay declarations of co-conspirators. However, . . . in certain instances where it is not "reasonably practicable to require the showing to be made before admitting the evidence, the court may admit the statements subject to being connected up."

United States v. Petersen, 611 F.2d at 1330 (quoting *United States v. James,* 590 F.2d at 582).

We do not wish to intimate that a district court may depart from the preferred order of proof without some substantial reason for doing so. However, we believe that the district court did not abuse its discretion in this case, particularly since the trial was held before the *Petersen* procedures were announced by this court.

Prior Misconduct

Knowles argues that evidence of other acts of misconduct was improperly admitted at trial. Fed. R. Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Knowles' defense was that he intended to operate a legitimate business, and that his inability to pay creditors was the result of Samuel Calabrese's failure to pay for goods promptly rather than the result of a fraudulent scheme. To support his defense, Knowles introduced testimony that he contributed lumber to the enterprise and lost this investment when the business collapsed. To rebut this defense, the government elicited testimony from a witness that Knowles told him he had obtained the lumber on credit and that the seller was attempting to reposses it. The witness testified that Knowles said, "My name is crime and crime doesn't pay. I have countersued [the seller] through my attorney." (Record. vol. 5. at 484).

These statements were relevant and admissible because they contradicted Knowles' claim, central to his defense, that he suffered a personal financial loss in the lumber company's demise. Evidence of other misconduct is admissible to show intent when, as here, intent is in issue. *See* 2 J. Weinstein & M. Berger, *Weinstein's Evidence,* ¶ 404[12] (1980). The government's evidence tended to rebut Knowles' claim that he was a victim of circumstances and did not intend to defraud the enterprise's creditors. *See United States v. Jacobson,* 578 F.2d 863, 866 (10th Cir.), *cert. denied,* 439 U.S. 932 (1978).

Testimony was also admitted concerning Knowles' alleged use of forged cashier's checks in an unrelated transaction. The trial court ordered that some of the testimony be stricken from the record, and we believe that the remaining portion of the testimony constituted harmless error.

Prior Conviction

The government sought to elicit from Knowles an admission that nine years before trial he was convicted of an offense. Knowles' response revealed that the conviction was beyond the ten-year period established by Fed. R. Evid. 609 for admissibility of prior conviction evidence. The trial judge sustained objections to the question and instructed the jury to disregard it. When considered in context, the procedures followed by the trial court were not an abuse of its discretion.

The Trial Court's Instructions to the Jury

Samuel Calabrese challenges certain of the trial judge's instructions to the jury. He contends that the jury should not have been instructed that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending on the evidence presented them." (Record, supp. vol. 5, at 36-37). Although this instruction has been expressly disapproved in this circuit, *United States v. Pepe,* 501 F.2d 1142, 1144 (10th Cir. 1974), it has been held not to be reversible error when there are repeated references to the reasonable doubt standard elsewhere in the

instructions. *Id.* at 1143-44; *United States v. Partin,* 552 F.2d 621, 643 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977). Here the instructions mentioned the reasonable doubt standard at least twenty-one times and the court explained that "[a] reasonable doubt exists whenever after careful and impartial consideration of all the evidence in the case the jurors do not feel convinced to a moral certainty that a defendant is guilty of a charge."[1] (Record, supp. vol. 5, at 35). *See United States v. Pepe,* 501 F.2d at 1143-44. It must also be remembered that "a single instrauction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-47 (1973). Therefore, although we repeat our disapproval of this instruction, we hold that it was not reversible error in light of other instructions given by the trial court.

Relying on *United States v. Stanfield,* 521 F.2d 1122 (9th Cir. 1975), defendant challenges the court's instruction that "[y]our sole interest is to ascertain the truth from the evidence in this case." (Record, supp. vol. 5, at 38). In *Stanfield* the trial judge's unorthodox opening remarks may have left the jurors with the understanding that it was their duty "to decide the case only by determining which of the two sets of purported facts was true" without regard to the reasonable doubt standard. *Id.* at 1126. By contrast, the instruction here was simply an explanation that the jury's duty included resolving credibility issues, and did not create the impression that the jury's duty was merely to adopt one of two versions of the facts, regardless of the reasonable doubt standard.

[1]Contrary to defendant's contention, the "moral certainty" definition as employed in the circumstances here was at most curative, and not objectionable. *See* United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974); United States v. Smaldone, 485 F.2d 1333, 1348 (10th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974).

Samuel Calabrese failed to raise at trial his other objections to the instructions. We have determined that the challenged instructions do not constitute plain or grave error amounting to the denial of a fundamental right. No other review is required. *United States v. Harper,* 579 F.2d 1235, 1239 (10th Cir.), *cert. denied,* 439 U.S. 968 (1978); *Lowther v. United States,* 455 F.2d 657, 664 (10th Cir.), *cert. denied,* 409 U.S. 857, 887 (1972).

Request for Written Instructions

Knowles contends that the trial judge improperly denied his request for written jury instructions. Giving the jury a copy of the instructions is desirable in complex cases, *see United States v. Standard Oil Co.,* 316 F.2d 884, 896 (7th Cir. 1963), but the practice is within the sound discretion of the trial judge. *Oertle v. United States,* 370 F.2d 719, 729 (10th Cir. 1966), *cert. denied,* 387 U.S. 943 (1967); *United States v. Conley,* 503 F.2d 520, 522 (8th Cir. 1974). We find no abuse of that discretion here.

Multiplicity and Duplicity

Knowles argues that a number of the counts alleging interstate transportation of stolen property were multiplicitous and duplicitous, because in some instances the contents of several truckloads of stolen merchandise were recorded on single invoice form, and in other instances two invoice forms were used to list the contents of a single truckload. The number of invoice forms used to record merchandise, however, is irrelevant. The graveman of a violation

of 18 U.S.C. §2314 is transportation of stolen goods in interstate commerce. Each act of interstate tranportation involving goods of the requisite jurisidctional amount is chargeable as a separate offense. *See United States v. Gotches,* 547 F.2d 80, 82 (8th Cir. 1977); *United States v. Dilts,* 501 F.2d 531, 534 (7th Cir. 1974); *see also Badders v. United States,* 240 U.S. 391, 394 (1916). Therefore, the counts were not multiplicitous or duplicitous.

Knowles' argument that grouping two invoices in a single count is an improper means of achieving the §2314 jurisdictional amount is similarly flawed. It is of no consequence that the property in a single truckload was represented by more than one invoice.

Pattern of Racketeering Activity

Knowles argues that the interstate transportation of numerous truckloads of stolen building materials did not constitute a pattern of racketeering activity with the meaning of 18 U.S.C. §1961(1), because the transactions were between the same parties and thus constituted "a single customer transaction." The clear language of the statute refutes this argument. Section 1961(1) defines "racketerring activity" as "(B) any act which is indictable under . . [18 U.S.C.] sections 2314 and 2315." Section 1961(5) defines a "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter, and the last of which occurrred within ten years . . . after the commission of a prior act of racketeering activity." The government established the §2314 offenses and proved they were committed within the statutory period and pursuant to a single, continuing

enterprise. *See United States v. Kaye,* 556 F.2d 855, 860-61 (7th Cir.), *cert. denied,* 434 U.S. 921 (1977). Thus the government proved a pattern of racketeering activity.

Pretrial Agreement

Knowles contends that the government improperly withdrew from a pretrial agreement in which defendant agreed to plead guilty to the conspiracy count and testify truthfully in the grand jury and trial proceedings and the government agreed to dismiss the remaining counts at the sentencing stage. Before trial, the government advised Knowles' attorney by letter that it considered the agreement null and void because of Knowles' failure to abide by its provisions and that it intended to prosecute Knowles on all counts. The government filed a sealed copy of the letter with the trial court.

Defendant apparently did not object to this letter at the time. Neither did he plead guilty to any count or testify for the government. Following his prosecution and conviction on all counts, defendant moved to vacate the sentence, alleging that the government had breached the agreement and rquesting a hearing.

The government's response included a sworn statement by a Department of Justice attorney attesting that after signing the agreement defendant refused to give any statement to the F.B.I. agent who repeatedly attempted to interview him and that defendant notified the agent that he would not cooperate in the investigation or testify at trial. The statement also attested that the attorney later met with defendant and told him that defendant had failed to abide by the plea agreement's terms, and that he must advise the

attorney within one week whether he intended to plead guilty and testify for the government. Defendant replied that he would talk to his counsel and notify the government attorney of his decision. However, the government attorney heard nothing thereafter from the defendant or his counsel regarding a guilty plea or testimony.

The government argued that defendant's conduct violated the agreement, and the government particularly pointed to language in the agreement providing that

> [t]he defendant, CHARLES R. KNOWLES, understands and agrees that if he wilfully fails to comply with any part of this agreement, or that if he fails to tell the complete and entire truth as to any material matter to agents or attorneys for the United States, or if he fails or refuses to testify truthfully as to any material matter in any Grand Jury or trial proceeding, this agreement is null and void, [and] all charges can and will be brought against him. . . .

(Record, Pleadings, vol. 2, at 215).

The district judge denied defendant's motion to vacate, specifying that he believed that defendant had the burden of proving a breach by the government, but that in any event the government had introduced a sworn statement alleging facts amounting to breach, and the defendant had produced no evidentiary support for his assertion of breach by the government.

Courts have frequently looked to contract law analogies in determining the rights of defendants aggrieved in the plea negotiation process. *See Cooper v. United States,* 594 F.2d 12, 15-16 (4th Cir. 1979); Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Cal. L. Rev. 471, 530 (1978). It is clear that a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under

the agreement. *United States v. Simmons,* 537 F.2d 1260, 1261 (4th Cir. 1976); *United States v. Resnick,* 483 F.2d 354, 358 (5th Cir.), *cert. denied,* 414 U.S. 1008 (1973); *United States v. Nathan,* 476 F.2d 456, 459 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973).

The analogy to contract law doctrines is not determinative in the area of plea negotiation, however. Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate "safeguards to insure the defendant what is reasonably due [in] the circumstances." *Santobello v. New York,* 404 U.S. 257, 262 (1971); *see Cooper v. United States,* 594 F.2d 12, 15-20 (4th Cir. 1979).

We believe that one requisite safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea bargaining agreement. The question of a defendant's breach is not an issue to be finally determined unilaterally by the government. *United States v. Simmons,* 537 F.2d 1260, 1261-62 (4th Cir. 1976). If the pleadings reveal a factual dispute on the issue of breach, the district court must hold a hearing to resolve the factual issues. If the pleadings reveal no disputed factual issues, no hearing is necessary and the court may determine the issue of breach as a matter of law.

We believe that constitutional principles of fairness also require that once the government acknowledges the existence of an agreement, the government has the burden of establishing a breach by the defendant if the agreement is to be considered unenforceable.

In this case there was a judicial determination of breach. Although the trial judge incorrectly believed that the burden of persuasion was on defendant, he did not rest his decision on that belief, but rather weighed the government's sworn

statement against the "complete absence of evidentiary support for defendant's assertion that the government breached the agreement." (Record, Pleadings, vol. 2, at 230-231). Since defendant failed to produce an affidavit or any other evidence raising a factual dispute,[2] summary disposition of the issue was proper.

The above framework and analysis assume that defendant had an adequate opportunity to respond to the government's pleadings on the issue of breach. This assumption, however, is put at issue by the record. The defense attorney's reply to the government's sworn statement alleged that defendant had been transferred from the county jail to a federal facility and that defense counsel had not yet learned of defendant's whereabouts at the time of filing the reply. Therefore, we remand to the district court for a determination whether, between the filing of the government's sworn statement and the court's order, defendant had an adequate opportunity to supplement his pleadings with an affidavit or other documents disputing the facts alleged in the government's statement. If he did not, the trial court must allow defendant to file such documents and must then redetermine the issue of breach under the framework outlined above. If defendant's failure to file such documents before the motion was denied was caused by the fault of defendant or his counsel rather than by the government's exercise of control

[2]Defendant's attorney alleged in an unsworn pleading that the F.B.I. agent "harassed [defendant] in such a manner as to prevent cooperation." (Record, Pleadings, vol. 2, at 222). Were this allegation submitted in a sworn statement it arguably might have sufficiently disputed the government's sworn statement to warrant an evidentiary hearing on the issue of breach. However, we think that the trial judge could have properly concluded that defendant's subsequent conversation with the government attorney and his failure to contact the attorney, plead guilty, or testify constituted a breach of the agreement.

over defendant in transferring him to another facility, defendant will not be allowed to file such documents, and the trial court's order will be affirmed.

The judgments in Nos. 79-1388 (Charles Armen Calabrese) and 79-1390 (Samuel Ray Calabrese) are severally affirmed. In No. 79-1382 (Charles R. Knowles) the case is remanded for further proceedings in light of this opinion.

APPENDIX B

United States District Court
DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA	: Criminal No. CR 78-00087
v.	: 18 U.S.C. §1962(c), (d) (Racketeer Influenced and Corrupt Organizations)
CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE,	:
ALBERT MARCHINI	: 18 U.S.C. §2314 (Interstate Transportation of Stolen Property)
	: 18 U.S.C. §2 (Aiding and Abetting)

INDICTMENT

The Grand Jury charges:

Count One

At all times material to this Indictment, and specifically during the year 1976:

1. The defendant CHARLES R. KNOWLES was associated with Pleasant Grove Building Supply, Pleasant Grove, Utah.

2. The defendants SAMUEL RAY CALABRESE and CHARLES ARMEN CALABRESE were associated with Western Builders Supply, Las Vegas, Nevada.

3. The defendant ALBERT MARCHINI was associated with Marchini Construction Company and Western Builders Supply, Las Vegas, Nevada.

4. Pleasant Grove Building Supply, Western Builders Supply, and Marchini Construction Company were enterprises as defined by Section 1961(4) of Title 18, United States Code, and were engaged in and their activities affected interstate commerce. ALBERT MARCHINI devised a scheme to defraud the creditors of Pleasant Grove Building Supply and Western Builders Supply.

6. It was part of the scheme to defraud that the defendant CHARLES R. KNOWLES, doing business through Pleasant Grove Building Supply, did obtain lumber, building materials, appliances, paint, and other products and materials on credit from various suppliers in Utah, California, and Virginia, and did ship them to the defendants SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI, doing business through Western Builders Supply and Marchini Construction Company in Las Vegas, Nevada, for sale to the public at prices below cost.

7. It was a further part of the scheme to defraud that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI did obtain the aforementioned materials from various suppliers by false and fraudulent pretenses, representations and promises.

8. It was a further part of the scheme to defraud that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI did represent and imply that they

would make full and timely payment for all materials ordered and received by Pleasant Grove Building Supply and Western Builders Supply, when in fact they had no intention of paying for and did not in fact pay for such materials.

9. It was a further part of the scheme to defraud that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI did transport and cause to be transported in interstate commerce materials of a value in excess of $5,000, knowing them to have been taken by fraud.

10. From on or about May 1, 1976, to on or about August 31, 1976, in the District of Utah and elsewhere, the defendant CHARLES R. KNOWLES, being associated with an enterprise engaged in and the activities of which affected interstate commerce, that is, Pleasant Grove Building Supply, did conduct and participate, directly and indirectly, in the affairs of Pleasant Grove Building Supply through a pattern of racketeering activity, that is, Counts Four through Nineteen of this Indictment, which are hereby incorporated by reference, all in violation of Section 1962(c) of Title 18, United States Code.

Count Two

1. Paragraphs 1 through 9 of Count One of this Indictment are hereby realleged and incorporated by reference.

2. From on or about May 1, 1976, to on or about August 31, 1976, in the District of Utah and elsewhere, the defendants SAMUEL RAY CALABRESE and CHARLES ARMEN CALABRESE, being associated with an enterprise engaged in and the activities of which

affected interstate commerce, that is, Western Builders Supply, did conduct and participate, directly and indirectly, in the conduct of the affairs of Western Builders Supply through a pattern of racketeering activity, that is, Counts Four through Nineteen of this Indictment, which are hereby incorporated by reference, all in violation of Section 1962(c) of Title 18, United States Code.

Count Three

1. Paragraphs 1 through 9 of Count One of this Indictment are hereby realleged and incorporated by reference.

2. From on or about May 1, 1976, to on or about August 31, 1976, in the District of Utah and elsewhere, the defendant ALBERT MARCHINI, being associated with enterprises engaged in and the activities of which affected interstate commerce, that is, Western Builders Supply and Marchini Construction Company, did conduct and participate, directly and indirectly in the affairs of Western Builders Supply and Marchini Construction Company, through a pattern of racketerring activity, that is, Counts Four through Nineteen of this Indictment, which are hereby incorporated by reference, all in violation of Section 1962(c) of Title 18, United States Code.

Counts Four Through Nineteen

1. Paragraphs 1 through 9 of Count One of this Indictment are hereby realleged and incorporated by reference.

2. In or about June 1976, in the District of Utah and elsewhere, the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI did unlawfully, willfully and knowingly transport and cause to be transported in interstate commerce goods, wares, and merchandise of a value in excess of $5,000, knowing the same to have been stolen, converted and taken by fraud, that is:

Count Four

One truckload, designated as the "first load" on Pleasant Grove Building Supply invoice numbers A00131 and A00526, dated June 2, 1976 and June 14, 1976, consisting of approximately $6,116.86 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Five

One truckload, designated as the "second load" on Pleasant Grove Building Supply invoice numbers A00131 and A00526, dated June 2, 1976, and June 14, 1976, consisting of approximately $6,048.42 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Six

One truckload, designated as the "third load" on Pleasant Grove Building Supply invoice numbers A00131 and

A00526, dated June 2, 1976, and June 14, 1976, consisting of approximately $6,653.59 worth of lumber, cork and a typewriter, shipped from the State of Utah to Las Vegas, Nevada.

Count Seven

One truckload, designated as the "fourth load" on Pleasant Grove Building Supply invoice numbers A00281 and A00282, dated June 5, 1976, consisting of approximately $5,489.24 worth of lumber, building materials, air conditioners and a trash compacter, shipped from the State of Utah to Las Vegas, Nevada.

Count Eight

One truckload, designated as the "fifth load" on Pleasant Grove Building Supply invoice numbers A00306, A00307 and A00318, dated June 7, 1976, consisting of approximately $7,334.54 worth of lumber, building materials, refrigerators, ranges, and dishwashers, shipped from the State of Utah to Las Vegas, Nevada.

Count Nine

One truckload, designated as the "sixth load" on Pleasant Grove Building supply invoice number A00402, dated June 9, 1976, consisting of approximately $5,130.53 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Ten

One truckload, designated as the "seventh load" on Pleasant Grove Building Supply invoice number A00473, dated June 11, 1976, consisting of approximately $5,995.52 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Eleven

One truckload, designated as the "eighth load" on Pleasant Grove Building Supply invoice number A00473, dated June 11, 1976, consisting of approximately $6,728.82 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Twelve

One truckload, designated as the "ninth load" on Pleasant Grove Building Supply invoice number A00515, dated June 12, 1976, consisting of approximately $7,015.63 worth of lumber and two rider lawn mowers, shipped from the State of Utah to Las Vegas, Nevada.

Count Thirteen

One truckload, designated as the "tenth load" on Pleasant Grove Building Supply invoice number A00515, dated June 12, 1976, consisting of approximately $5,475.91 worth of lumber and building materials, shipped from the State of Utah to Las Vegas, Nevada.

Count Fourteen

One truckload, designated as the "eleventh load" on Pleasant Grove Building Supply invoice number A00586, dated June 15, 1976, consisting of approximately $10,298.44 worth of lawn mowers, lawn care equipment, dishwashers, refrigerators, and shingles, shipped from the State of Utah to Las Vegas, Nevada.

Count Fifteen

One truckload, designated as the "twelfth load" on Pleasant Grove Building Supply invoice numbers A00616, dated June 16, 1976, consisting of approximately $7,658.22 worth of paneling and lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Sixteen

One truckload, designated as the "thirteenth load" on Pleasant Grove Building Supply invoice numbers A00709, dated June 19, 1976, consisting of approximately $5,944.32 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Seventeen

One truckload, designated as the "fourteenth load" on Pleasant Grove Building Supply invoice numbers A00734, A00735 and A00736, dated June 22, 1976, consisting of approximatelky $18,854.60 worth of washers, dryers, ranges, refrigerators and dishwashers, shipped from the State of Utah to Las Vegas, Nevada.

Count Eighteen

One truckload, designated as the "fifteenth load" on Pleasant Grove Building supply invoice number A00738, dated June 22, 1976, consisting of approximately $6,342.22 worth of lumber, shipped from the State of Utah to Las Vegas, Nevada.

Count Nineteen

Two truckloads, designated as the "sixteenth and seventeenth loads" on Pleasant Grove Building Supply invoice number A00801, dated June 23, 1976, consisting of approximately $33,724.76 worth of water heaters, toilets, dishwashers, a range and Evans Outside Latex paint, shipped from the State of Utah to Las Vegas, Nevada.

All of the above, Counts Four through Nineteen, in violation of Sections 2314 and 2, Title 18, United States Code.

Count Twenty

1. Paragraphs 1 through 4 of Count One of this Indictment are hereby realleged and incorporated by reference.

2. From on or about May 1, 1976, up to the date of this Indictment, in the District of Utah and elsewhere, the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI did unlawfully, knowingly and will fully conspire to violate the provisions of Section 1962(c) of Title 18, United States Code.

3. It was part of the conspiracy that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI would conduct the affairs of Pleasant Grove Building Supply, Western Builders Supply and Marchini Construction Company, through a pattern of racketeering activity.

4. It was a further part of the conspiracy that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI would defraud the creditors of Pleasant Grove Building Supply and Western Builders Supply.

5. It was a further part of the conspiracy that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI would obtain lumber, building materials, appliances, paint and other products and materials from various suppliers in Utah, California and Virginia by means of false and fraudulent pretenses, representations and promises.

6. It was a further part of the conspiracy that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI would represent and imply that they would make full and timely payment for all materials ordered through Pleasant Grove Building Supply and Western Builders Supply, when in fact they had no intention of paying for and did not in fact pay for such materials.

7. It was a further part of the conspiracy that the defendants CHARLES R. KNOWLES, SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE, and ALBERT MARCHINI would transport and cause to be

transported in interstate commerce materials of a value of $5,000 or more, knowing them to have been obtained by fraud.

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the District of Utah and elsewhere:

1. On or about May 1, 1976, the defendant CHARLES R. KNOWLES instructed Paul Warnick to purchase lumber, appliances and building materials on credit for shipment to Las Vegas, Nevada.

2. On or about June 3, 1976, defendants CHARLES R. KNOWLES and SAMUEL RAY CALABRESE met at Pleasant Grove Building Supply, Pleasant Grove, Utah.

3. On or about June 4, 1976, defendant ALBERT MARCHINI sold lumber, studs, and shingles, shipped from Pleasant Grove Building Supply, to Van's Building Supply, Las Vegas, Nevada.

4. On or about June 15, 1976, the defendant SAMUEL RAY CALABRESE wrote a $30,000 check drawn on non-sufficient funds, payable to Kaibab Industries.

5. On or about June 17, 1976, the defendant CHARLES ARMEN CALABRESE signed a Western Builders Supply invoice for the sale of $5,000 worth of appliances to Charleston TV and Appliance, Las Vegas, Nevada.

6. On or about June 20, 1976, the defendant SAMUEL RAY CALABRESE wrote three $10,000 checks, drawn on nonsufficient funds, payable to Pleasant Grove Building Supply.

7. On or about June 22, 1976, in Salt Lake City, Utah, the defdant CHARLES R. KNOWLES gave a financial

statement of Pleasant Grove Building Supply, dated May 31, 1976, to a representative of Kaibab Industries.

8. On or about June 24, 1976, the defendants SAMUEL RAY CALABRESE, CHARLES ARMEN CALABRESE and ALBERT MARCHINI met with representatives of Kaibab Industries, in Las Vegas, Nevada.

All in violation of Title 18, United States Code, Section 1962(d).

0A TRUE BILL.

/s/ John T. McArdle

Foreman

RONALD RENCHER
United States Attorney

By: /s/ Steven W. Snarr

Assistant United States Attorney